

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1

**STATEMENT IN SUPPORT OF PITNEY BOWES INC.'S MOTION TO COMPEL
UNITED STATES POSTAL SERVICE TO FILE A COMPLETE LIST OF
NONPOSTAL SERVICES**

The Association for Postal Commerce, Alliance of Nonprofit Mailers, Direct Marketing Association, Magazine Publishers of America, Inc., National Postal Policy Council and Parcel Shippers Association (“PostCom *et al.*”) respectfully submit this Statement in Support of Pitney Bowes Inc.’s October 15 Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services (“Motion to Compel”). The recent discovery during the pendency of this docket that the Postal Service has begun to offer USPS-branded replacement postage meter cartridges in competition for ink cartridges sold by Pitney Bowes and other private vendors raises very serious issues. This particular initiative clearly runs afoul of the applicable statute and regulations as well as basic notions of the role of the Postal Service. As a result, the Commission must reopen this proceeding for additional comment.

**The Products at Issue Were Not Identified as Nonpostal Services in this
Docket and Cannot Qualify as Authorized Nonpostal Services
under 39 U.S.C. §404(e)**

The Postal Service failed to include, let alone mention, the sale of USPS-branded postage meter cartridges in its list of nonpostal services that it filed in this docket as required by Order No. 50, which directed the Postal Service to file “a complete description of each

nonpostal service offered by the Postal Service on the date of enactment of the PAEA.” PRC Order No. 50 (December 20, 2007) at 2. In any event, these products could not be authorized as a nonpostal services under 39 U.S.C. §404. First, the PAEA authorizes the Commission to consider authorizing the continuation of a nonpostal service only if the Postal Service offered the service as of January 1, 2006. The Postal Service does not contend that it offered USPS-branded replacement postage meter cartridges for sale to the public on or before January 1, 2006. To the contrary, the marketing initiative appears to have begun only a few months ago.

Second, 39 U.S.C. §404(e)(3) authorizes the Commission to allow the Postal Service to continue providing a nonpostal service only upon a finding that “the public need for the service” and “the ability of the private sector to meet the public need for the service” so warrant. The Postal Service has not contended—and clearly could not contend—that the private sector is incapable of meeting supplying replacement ink cartridges for postage meters offered by the private sector. To the contrary, as Pitney Bowes indicates, multiple firms already compete in this product market.

The Products at Issue Fail to Qualify as Postal Services

Under 39 U.S.C. §102(5), postal services “refer to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.” The Postal Service has not claimed, and could not seriously maintain, that the sale of replacement printer cartridges is ancillary to any of these delineated services. Nevertheless, even if the Postal Service were to make such a claim, the Postal Service would be required to obtain the Commission’s approval before introducing a new postal service, and would be required to comply with the standards and procedures imposed by 39 U.S.C. §3642 as conditions to such authorization. *See PostCom et al. Reply Brief at 7-14.*

Clearly, the Postal Service has failed to follow these procedures with respect to these products, and, as Pitney Bowes points out, there is grave doubt that such a postal product meets the requirements of 39 U.S.C. §3642(b)(3). *See* Motion to Compel at 6-7.

**Even Assuming, *Arguendo*, the Existence of a “Third Bucket,”
the Products at Issue Do Not Fall within It**

The Postal Service has asserted that certain products it offers fall within an amorphous “third bucket” of revenue-producing activities (including licensing ventures) that are neither postal products nor non-postal services. It is quite possible that the Postal Service may assert that USPS-branded replacement postage meter cartridges fall within this category. Whether such a category exists, however, has yet to be determined. Order No. 74 (April 29, 2008) at 3-14, *clarified*, Order No. 77 (May 28, 2008). Regardless, it is certainly not for the Postal Service to unilaterally decide exactly what new offerings it chooses to place in this category.

Moreover, the Postal Service cannot evade regulatory oversight of a product or service by offering it through a licensing arrangement rather than directly to the public. While it is true that the statute does permit the Postal Service to license its trademarks, licensing, *per se*, is not a separate product or service, but rather a means of offering a product or service. Section 404(e) plainly contemplates that the Commission must still determine whether the underlying product that bears the Postal Service’s trademark falls within either of the two statutory categories. To read the statute otherwise would allow the Postal Service to evade those statutory limits and to engage in virtually any business activity in direct competition with private firms in the same product market, simply by engaging in the activity through a licensing arrangement. Accordingly, while there may be some revenue-producing activities that do not readily fit into either of the two statutory categories, it is clear that the business that

is the subject of Pitney Bowes' Motion does not fall into that amorphous third bucket (if it exists at all).

Conclusion

Pitney Bowes raises important issues in its Motion to Compel. The Postal Service cannot be unfettered in its ability to introduce new competitive products simply under the rubric that licensing falls outside the scope of the Commission's authority. PostCom *et al.* believes instead that the sale of these products constitutes the introduction of a nonpostal service in violation of the PAEA. Pitney Bowes and its competitors are facing immediate harm from this brazen act by the Postal Service. Moreover, unchecked entry through licensing arrangements into product markets that the Postal Service regulates through its standard-setting and rulemaking authority ultimately could harm mailers and consumers by enabling the Postal Service to squeeze out private competition. It is essential that the Commission reopen this matter for additional comment as soon as possible to address these concerns. An appropriate procedure would be to (1) direct the Postal Service to show cause why its marketing of replacement ink cartridges is not unlawful, and (2) allow other interested parties to respond.

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